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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5441

ERIC STEWART ROBINSON, a minor by
his Guardian ad Litem, EDWARD J. COE,

Appellant,

v.

PATRICK A. KOLSTAD and
ALLSTATE INSURANCE COMPANY,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the Supreme Court of Wisconsin is reported at 84 Wis. 2d 579, 267 N.W. 2d 886 (1978), and is set forth in the Appendix, infra. p. 1a. The order of the Barron County Court denying a motion to dismiss is also set forth in the Appendix, infra. p. 1b.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 USC §1257(2), this being an appeal which draws into question the validity of Wis. Stats. §852.05(1), infra. p. 1 , on the ground that it is repugnant to the Constitution of the United States.

The County Court of Barron County, by County Judge Fred Van Sickle, denied a motion by Patrick A. Kolstad and his insurer, Allstate Insurance Company, defendants-appellees, to dismiss a complaint in a statutory wrongful death action. On appeal, this order denying the motion was reversed on June 30, 1978, by the Supreme Court of Wisconsin. A rehearing was not sought.

Timely notice of appeal to this Court was filed in the Supreme Court of Wisconsin on August 24, 1978. As the Supreme Court of Wisconsin rejected appellant's challenge to Wis. Stats. §852.05(1), this matter is appropriately brought to this Court by appeal. Levy v. Louisiana, 391 U.S. 68 (1968); Trimble v. Gordon, 430 U.S. 762 (1977).

The Statute Involved

The statute involved in this suit is Wis. Stats. §852.05(1) published at Wisconsin Statutes 1975, page 4270:

> 852.05 Status of illegitimate person for purposes of intestate succession. (1) An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by intestate succession from and through (a) his mother, and (b) his father if the father has either been adjudicated to be such under ss. 52.21 to 52.45, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him.

Question Presented

Where a state's wrongful death statutes impose upon an infant a qualification to become "legitimized" impossible of attainment, and where other statutes deny him a cause of action by reason of his "illegitimate status," do such statutes offend his constitutional rights and, therefore, are void?

Statement of the Facts of the Case

This case involves the question of whether a posthumous illegitimate child can bring a wrongful death action for the death of his putative father. Appellant, Eric Stewart Robinson, was born on June 16, 1973. His natural mother, Susan Robinson Taft, nee Robinson, had commenced keeping steady company with one Keith Larson in October, 1971, and maintained that relationship until October 29, 1972, when Larson was killed in a car/truck collision in Wisconsin. Two days prior to Larson's death he and Susan were informed, after she had submitted to a laboratory test for pregnancy which Larson had paid for, that she was pregnant. Susan had had sexual relations exclusively with Keith Larson and Larson never questioned the paternity, but laid plans to get married as soon as possible and had told a number of friends that he and Susan were to be married. As a result of these facts, the appellant, Eric Stewart Robinson, contends that Keith Larson is his natural father.

On October 29, 1972, before he and Susan could be married, Keith died as the result of a collision between the automobile he was driving and a pickup truck owned and operated by the defendant-appellee Patrick A. Kolstad. On December 30, 1976, this wrongful death action was commenced in the County Court of Barron County by the plaintiff-appellant to recover for loss of support, maintenance, society and companionship of his natural father, Keith Larson.

The defendants-appellees on February 10, 1977, moved to dismiss the action for failure to state a claim upon which relief could be granted because the plaintiff-appellant lacked standing to

maintain the action. Defendants-appellees argued that under Wis. Stats. §895.04(2) only lineal heirs can bring a wrongful death action where there is no surviving spouse; and the plaintiff-appellant, Eric Stewart Robinson was not a lineal heir because the requirements of Wis. Stats. §852.05 were not met. Before the plaintiff-appellant could bring this suit under Wis. Stats. 895.04(2) and 852.05 for the wrongful death of his natural father, one of several conditions had to be met:

(1) his father had to have been adjudicated to be the father; or

(2) his father had to have admitted in open court that he was the father; or

(3) his father had to have acknowledged himself to be the father in writing signed by him.

In the instant case it is physically impossible for Eric Stewart Robinson to meet any of the conditions, and thus he has no remedy.

How the Federal Questions Were Raised and Decided Below

In response to defendants-appellees' motion to dismiss, the plaintiff-appellant filed a brief, in which he contended that the statute in question offended the Constitutions of the United States and Wisconsin because it was physically impossible for Eric Stewart Robinson to meet any of the statutory requirements. The plaintiff was denied equal protection of the law because of the nature of the illegitimate/legitimate classification, and was denied due process by the fact that the door to the judicial system for redress was closed to him by the statute.

The County Court of Barron County, by Judge Fred Van Sickle, on August 4, 1977, denied the defendants-appellees' motion to dismiss stating:

> It seems to this Court that the basic question was recently decided by the United States Supreme Court in the case of Deta Mona Trimble and Jessie Trimble, Appellants, vs. Joseph Roosevelt Gordon et al.

> Although the facts are different, I believe that when the United States Supreme Court decided in the foregoing case that to put legitimate persons in one classification and illegitimate persons in a different classification, is to deny the illegitimate person the equal protection of the law as provided in the United States Constitution.
>
> Accordingly, defendants' motion to dismiss is denied.

A copy of that order is presented in the Appendix, infra. p. 1b.

On October 25, 1977, the defendants-appellees filed a notice of appeal to the Supreme Court of Wisconsin. The plaintiff-appellant, Eric Stewart Robinson, in his brief again raised the invalidity of the statute which denied the plaintiff standing to bring this wrongful death action.

The Supreme Court of Wisconsin on June 30, 1978, reversed the lower court's order with directions to dismiss the complaint. The Supreme Court framed the questions before it as follows:

> whether a posthumous illegitimate child may maintain an action for the death of his putative father under the wrongful death statutes. (infra. p. 2b)

The majority opinion of the Supreme Court then, based on its holding in In Re Estate of Blumreich and Caldwell v. Estate of Blumreich, 84 Wis. 2d 545, 267 N.W. 2d 870 (1978), decided the same day as this case, rejects the argument that the statutory requirements deny after-born illegitimates equal protection or due process of law:

> Sec. 852.05 (1), Stats., prescribes reasonable means of proof of paternity for illegitimate children. There is no separate statutory classification for children born out of wedlock. Under no construction of the statutes can it be said that there is a statutory disinheritance of illegitimate children. In addition to the legitimization of children by such procedures as subsequent marriage of the parents and adoption, sec. 852.05(3), paternity may be shown by an adjudication in paternity proceedings, by oral or written admissions of the father in open court, or by acknowledgment in writing signed by the putative father without a witness. The only types of proof excluded by the statutes are oral admissions outside of court or unsigned written acknowledgments. Sound policy reasons for these legislative exclusions are readily apparent.
>
> The constitutional provisions, both state and federal, for the protection of individuals, involve difficult questions of balancing, and the particular facts in the instant case make it especially so. However, every law enacted, unless it applies to all

> persons at all times and in all places, inevitably affects some and does not affect others.
>
> If it could be said that the legislative enactment categorically disinherited posthumous illegitimate children, the argument of denial of equal protection under either the fourteenth amendment to the United States Constitution or art. I, sec. 1 of the Wisconsin Constitution would rise to a different dimension. We do not believe the classifications reflected in the statutes under consideration are proscribed by either state or federal constitutional provisions. The statutes accord illegitimate children the same rights accorded children born in wedlock, provided only that they establish their parentage in a manner recognized by the statutes. In prescribing reasonable methods of proving parentage, the statutes serve legitimate legislative purposes.
>
> The fact that the statutes do not alleviate all difficulties, or that they might have provided otherwise, does not ipso facto make them a denial of equal protection.

The dissent, in an opinion by Justice Day and concurred in by Justice Abrahamson, would affirm the order of the trial court. Relying on their dissent in the Blumreich cases, supra., they find that Wis. Stats. 852.05(1) denies posthumous illegitimates equal protection and due process.

The dissent then takes issue with the majority's statement that "(T)he statutes accord illegitimate children the same rights accorded children born in wedlock."

> Sec. 852.05(1) does not accord illegitimate children the same rights. Illegitimate children may not inherit from or recover for the wrongful death of their fathers unless there is a paternity adjudication or an acknowledgment in writing or in open court. With any posthumous illegitimate, these are nearly impossible requirements. A pre-natal paternity proceeding is as unlikely as the written acknowledgment of a fetus.
>
> In this case, the requirements of sec. 852.05(1) are especially onerous. Less than forty-eight hours passed from the time that Larson found out that Ms. Taft was pregnant until Larson died in the collision. During that time Larson was required by 852.05(1) to be adjudged the father in a paternity action or to acknowledge in writing that the fetus of Eric Robinson would one day be his child. As might be expected, Larson failed to meet the requirements of the statute. This failure means that Eric Robinson is forever barred from inheriting from his father and from receiving wrongful death benefits. In terms of equal protection, sec. 852.05(1) creates invidious discrimination against posthumous illegitimates. In terms of due process the statute creates an irrebuttable presumption that prevents posthumous illegitimates from establishing their paternity. Blumreich, supra.

The Federal Questions are Substantial.

This appeal raises the question of whether a state statute which in operation denies posthumous illegitimates the right to bring a wrongful death action for the death of their putative father denies them the protection of the Equal Protection and Due Process guarantees of the Fourteenth Amendment to the Constitution.

In analogous situations where the rights of illigitimates have been questioned and infringed upon, this Court has repeatedly held that substantial Federal questions were raised. Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty Company, 406 U.S. 164 (1972); Glona v. American Guarantee and Liability Insurance Company, 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

In upholding the constitutionality of Wis. Stats. 852.05(1), the Supreme Court of Wisconsin based its decision in part on Trimble v. Gordon, supra. It is plaintiff-appellant's contention that the Supreme Court of Wisconsin misconstrued this decision, and that in light of Trimble and the standard of review it sets forth, the validity of Wis. Stats. 852.05(1) cannot be sustained. In order to apply the holding in Trimble to the present facts and statute, and to re-emphasize and clarify the standard of review set forth in that opinion, probable jurisdiction should be noted and this Court should give this appeal plenary consideration.

I. THE CHALLENGED STATUTE DENIES POSTHUMOUS ILLEGITIMATES EQUAL PROTECTION OF THE LAWS.

A. A Stricter Standard of Review is to be Applied.

This Court in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972), stated that in testing the validity of a statute that approaches sensitive and fundamental personal rights, the Court will exercise a stricter scrutiny in examining the avowed state interests that the classifications promote. Thus, in Weber and the

cases that followed, the Court found that although illegitimacy was not a suspect classification, requiring a compelling state interest, classifications based on illegitimacy were to be reviewed with a scrutiny stricter than that applied to state economic and social regulations which do not approach these sensitive and fundamental personal rights.

This stricter standard of review should be applied to the statutory classification involved in this case. Had Eric been legitimatized, he would have unquestionably had standing to bring this wrongful death action for the death of his father. But because he is illegitimate, a status over which he had no control nor responsibility, he is denied the personal right to bring an action for the wrongful death of his putative father. As this Court stated in Weber at 169:

> An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged.

This stricter standard of review looks at the character of the discrimination and its relation to legitimate legislative aims. The Court will only look to those state purposes that have been offered by the state court or its legislature, and "mere incantation of a proper state purpose will not satisfy this level of scrutiny." Trimble at 769. Therefore, we must examine the character of the discrimination imposed by the challenged statute and this discrimination's relation to the legislative aims as articulated by the Wisconsin legislature and courts.

1. The character of the discrimination.

If Eric Stewart Robinson had been legitimate or legitimatized, this case would not be before this Court. But because Eric is illegitimate, a status he has no control over nor responsibility for, he is required to meet additional requirements that are not required of legitimate children who wish to exercise their right to bring an action for the wrongful death of their father. In order for a posthumous illegitimate to bring a wrongful death action, the father must before his death either be adjudicated to be the father, make an oral or written statement of paternity in open court, or make a signed, written

acknowledgment. The heavy burden of meeting these requirements is made unreasonably burdensome by the fact that for posthumous illegitimates the requirements are in operation impossible to meet.

The present case illustrates how the challenged provision is unreasonably burdensome on posthumous illegitimates. In a period of less than forty-eight hours Keith Larson, Eric's putative father, would have had to meet one of the three conditions set forth in the statute, which he did not. Even though Larson had told a number of friends of Susan's pregnancy and their plans to be married, and had asked a friend on two specific occasions to act as best man at the wedding, Eric is denied the right to bring this action because his father was not involved in a paternity action at the time, nor signed a written acknowledgment, both of which are not required nor probable during the first forty-eight hours in which a father learns that he is a father.

The discrimination is one that directly affects fundamental personal rights involving the family, and in operation has the effect of excluding posthumous illegitimates from bringing an action for the wrongful death of their putative fathers. As this Court stated in Weber at 171:

> The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them.

2. The statute's aims and their relationship to the challenged discrimination.

Wis. Stats. §852.05(1), in addition to determining lineal heirs for intestate succession, has also been used to determine lineal heirs for wrongful death actions, Krantz v. Harris, 40 Wis. 2d 709, 714, 162 N.W. 2d 628 (1968), and as establishing paternity for support allowances. In Re Estate of Blumreich, supra. In this case we are concerned with Wis. Stats. §852.05(1) as it applies to posthumous illegitimates bringing wrongful death actions. The legislative aims behind §852.05(1) in this context may be different than those involved in intestate succession. For example, the state's interest in the

accurate and orderly settlement of estates is a legitimate interest which might justify Wis. Stats. 852.05(1) as it applies to intestate succession, but has no significant relation to a wrongful death action, because the estate is not the beneficiary of the possible award, the relatives designated in Wis. Stats. §895.04(2) are. Thus, the relationship between the discrimination imposed by the statute and the legislative aims must be limited to those aims furthered within a wrongful death context.

The Wisconsin Supreme Court in this case stated that:

> Sec. 852.05(1), Stats., prescribes reasonable means of proof of paternity for illegitimate children. . . . Sound policy reasons for these legislative exclusions are readily apparent.

This is the extent of the Court's discussion of the state's interest in this case, and had it not been for the discussion of the state's interest in the companion cases, In Re Estate of Blumreich and Caldwell v. Estate of Blumreich, supra., the constitutional analysis would clearly be incomplete because the Court has articulated no state interests to be furthered and the reasonableness of the available alternatives has no constitutional significance. "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." Trimble at 769.

The Wisconsin Supreme Court did address the interests underlying Wis. Stats. 852.05(1) in a wrongful death context in the Blumreich Cases, supra. The Court recognized that the state cannot attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. (infra. p. 9d) But the Court did state a number of related interests that it felt sustained the challenged statute. These interests centered around the proof of paternity and involved the avoidance of extended uncertainty; the exclusion of evidence that may be imprecise, unreliable or unavailable; the exclusion of unduly burdensome methods of proof; and the prevention of fraudulent claims.

This Court has considered the state interest in having reasonable means of proving paternity, and stated in Trimble at 771:

> . . . Our previous decisions demonstrate a sensitivity to "the lurking problems with respect to proof of paternity," . . . and the need for the States to draw "arbitrary lines . . . to facilitate potentially difficult problems of proof," . . . "Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

Thus, the state's interest in prescribing reasonable means of proof of paternity may be a legitimate one, but it cannot operate to invidiously discriminate against posthumous illegitimates.

a. The avoidance of extended uncertainty.

The Wisconsin Supreme Court in the Blumreich Cases, at 84 Wis. 2d 562, states that "the statutory methods of proof avoid the extended uncertainty which would otherwise plague . . . wrongful death actions." But as Justice Day, dissenting, points out at page 577, the statutory classification does not necessarily reduce the period of uncertainty:

> This same lurking possibility of an unknown putative child is present under sec. 852.05(1). The father may have acknowledged an illegitimate child in writing, unknown to the other heirs or parties liable for the father's wrongful death.[7]
>
> [7]In Estate of Ecker, 174 Wis. 432, 182 N.W. 2d 977 (1921), this court found that the requirement of a written acknowledgement of illegitimate paternity was met based on a contract and notes to a saloonkeeper. The contract for purchase of a thresher referred to "Joseph Ecker and son." One of the notes to the saloonkeeper was written in German and stated, "Give my son Adolph a keg of beer on my name. Joseph Ecker." Ecker at 174 Wis. 435.
>
> With or without sec. 852.05(1), potential heirs and claimants can not be identified with confidence until after the period of limitations has elapsed.

Thus, the objective of avoiding extended uncertainty is not substantially furthered by the statute's discrimination and cannot be used to sustain its validity.

b. The elimination of evidence that may be imprecise, unreliable or unavailable.

The state may have a legitimate interest in the elimination of evidence that is imprecise, unreliable or unavailable. The statute

attempts to further this objective by a blanket disallowance of evidence which may in fact be reliable.

In an area such as this where the statute directly affects sensitive personal rights, this Court has required that the statute be carefully tuned to alternative considerations and not extend beyond its asserted purposes. Trimble at 41. The present statute sweeps too broadly in attempting to eliminate evidence that may be imprecise, unreliable or possibly unavoidable. For a significant category of illegitimates--posthumous illegitimates--their right to maintain a wrongful death action could be recognized without jeopardizing the state's purpose of protecting the integrity of paternity proceedings.

The posthumous illegitimate could be allowed to bring a posthumous paternity action, which is not allowed at this time, for the limited purpose of establishing the child as a lineal heir for wrongful death standing. The reason for the disallowance of imprecise and unreliable evidence is to preserve the integrity of the paternity determination. This could be achieved without compromising the state's interest by placing a higher burden of proof on the child claiming to be a lineal heir.

The Uniform Probate Code Section 2-109 allows for a paternity action after the death of the putative father, but requires that paternity be established by clear and convincing proof. Wisconsin itself allows for the proof of paternity, before the death of the putative father, but places a burden of clear and satisfactory preponderance of the evidence upon the complainant. Wis. Stats. §52.355. In addition, Section Six of the Uniform Parentage Act allows for the determination of the existence of the father and child relationship after the death of the father.

The present statute sweeps broader than its purported purpose. It could be more carefully tuned by requiring a higher degree of proof without compromising the state's interest in the integrity of the proceedings. Because the statute excludes posthumous illegitimate unnecessarily, it is constitutionally flawed.

c. The prevention of fraudulent claims.

The third related interest presented by the Wisconsin Supreme Court in the Blumreich Cases was the prevention of fraudulent claims. It is questionable whether this in fact was one of the objectives in the passing of this statute. The 1969 Comment to this statute states:

> The Committee carefully weighed the possibility that this section might encourage false claims, but decided this was not likely enough to justify unfair treatment in valid cases.

Thus, the concern in enacting this statute was the fair treatment in valid cases more than the prevention of false claims.

Even if the prevention of fraudulent claims was an objective of the statute, it does not justify what is in operation the blanket exclusion of posthumous illegitimates. In Jimenez, 417 U.S., at 636, this Court held that where the subclass of illegitimates was in fact dependent on the claimant, it would not serve the purpose of preventing spurious claims to conclusively deny them an opportunity to establish their dependency. An analogous situation is present in this case. Where, as in this case, it appears that the posthumous illegitimate is in fact the lineal heir of the putative father, there is no justification for the statute to, in operation, conclusively deny the posthumous illegitimate the opportunity to establish his claim.

The prevention of fraudulent claims could be furthered in a less restrictive way by placing a higher burden of proof on the posthumous illegitimate. The Minnesota Supreme Court in considering whether a paternity action could be brought after the death of the father stated in Weber v. Anderson, ___ Minn. ___, ___ N.W. 2d ___ (1978):

> . . . we recognize the legitimate concern that has been expressed in some of the cases from other jurisdictions about the risk of fraudulent claims against the putative father's estate. However, this risk is not significantly greater in paternity actions brought after the putative father's death than in many other types of actions, including an action by a party seeking to prove that he is the legitimate child of a decedent. Most importantly, we believe the risk is outweighed by the injustice

which is done to the innocent child by denying it an adjudication of paternity simply because its putative father happened to die.

> We believe that the risk of fraudulent claims in this context is better met, not by barring all such causes of action, but by requiring clear and convincing proof by the plaintiff that the putative father was in fact the father. This requirement provides a significant measure of protection to the putative father's estate, but does not take from the child all opportunity to prove paternity. "Clear and convincing proof" means exactly what is suggested by the ordinary meanings of the terms making up the phrase. Satisfaction of this standard requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is "highly probable."

Thus, the objective of preventing fraudulent claims would not be compromised by taking the "middle ground" of allowing posthumous illegitimates to use a limited paternity action to establish their claim with a higher burden of proof. Therefore, because the statute unnecessarily excludes posthumous illegitimate children, its validity cannot be sustained.

d. The elimination of unduly burdensome methods of proof.

The final state interest presented by the Court was the elimination of unduly burdensome methods of proof, or administrative convenience. (infra. p. 11d) This Court in Gomez v. Perez, 409 U.S. 535, 538 (1973), would not allow administrative convenience through the avoiding of paternity problems to construct "an impenetrable barrier that works to shield otherwise invidious discrimination." And in Mathews v. Lucas, 427 U.S. 495, 509 (1976), this Court stated:

> . . . Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. . .

The statute involved in this case is not permissible under the Fourteenth Amendment for the reason stated in this quote from Mathews. As to posthumous illegitimates whose fathers died before meeting the statutory conditions, they are conclusively presumed not to be a lineal heir of their putative father, contrary to what might be found if case-

by-case adjudication was allowed. This clearly exceeds the bounds of substantiality tolerated by the stricter level of scrutiny that should be applied to statutes discriminating against illegitimates. The United States Court of Claims reached this same conclusion in Gentry v. U.S., 546 F. 2d 343 (Ct. Cl. 1976), where the Court invalidated a law using "equal protection concepts, as embodied in the due process clause of the Fifth Amendment." The Court stated at 354:

> . . . We think the rule is that a legislative intent to serve administrative convenience by classification, though adequate to support the classification in some circumstances, is impermissible when that classification amounts to an absolute barrier to the enjoyment, by one subclass of illegitimates, of benefits presumptively made available to another subclass. Such a classification exceeds the bounds of substantiality tolerable as to illegitimates.

The state's interest in administrative convenience cannot sustain the validity of Wis. Stats. 852.05(1) as it is applied to posthumous illegitimates. By erecting an "impenetrable barrier" for the sake of administrative convenience against this class of illegitimates, the statute denies this class equal protection of the law guaranteed to them by the Fourteenth Amendment.

Wis. Stats. 852.05(1) denies the appellant-plaintiff, Eric Stewart Robinson, the equal protection of the law guaranteed to him by the Fourteenth Amendment. The articulated state interests are not substantially related to the character of the discrimination, and the statute has not been carefully tuned to alternative considerations. For these reasons we would ask that the Court note probable jurisdiction and set this case for plenary consideration with the submission of briefs and oral arguments.

II. THE CHALLENGED STATUTE DENIES POSTHUMOUS ILLEGITIMATES DUE PROCESS OF LAW.

A. Wis. Stats. §852.05(1) in Operation Conclusively Presumes that Unacknowledged or Non-adjudicated Posthumous Illegitimates are Not the Lineal Heirs of Their Putative Fathers, Thus Denying Them Due Process of the Law.

Wis. Stats. §852.05(1) establishes a presumption that if

one of its conditions is not met, the illegitimate is not a lineal heir. Normally this is a rebuttable presumption which can be overcome. But in the case of posthumous illegitimates that were not previously acknowledged or adjudicated to be a lineal heir, the statute in operation establishes a conclusive presumption which cannot withstand constitutional challenge.

This court in Turner v. Department of Employment Security, 423 U.S. 44, 46 (1975) (per curiam), held a conclusive presumption invalid where a basic human liberty was at stake. The liberty in Turner, supra., which triggered the requirement of individualized fact finding, was the "freedom of personal choice in matters of marriage and family life." The presumption, which was not necessarily nor universally true in fact, conclusively presumed that a woman was incapacitated and unavailable for employment for an extended period of time surrounding the due date of the child. The court found that the unemployment compensation boards were required to use "more individualized means when basic human liberties are at stake."

The conclusive presumption created by Wis. Stats. §852.05(1) is invalid for the reasons set forth in Turner and the other cases involving conclusive presumptions: The presumption infringes upon a basic human liberty, is not necessarily or universally true in fact, and the state has reasonable alternative means of making the crucial decision. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

1. The challenged presumption infringes upon a liberty deserving of protection.

The liberty involved in this case is the posthumous illegitimate child's liberty or right to establish the father-child relationship and thus recover for the loss of support, maintenance, society and companionship of his natural father. Because this is a substantial liberty and not a noncontractual claim to receive funds from the public

treasury as in Weinberger v. Salfi, 422 U.S. 749 (1975), it is deserving of the protection afforded by individualized fact finding.

This right has not previously been identified as a basic liberty, but this court has recognized similar liberties that would warrant that this liberty also be protected. In Levy v. Louisiana, 391 U.S. 68 (1968), this court held that where legitimate children were given the right to recover for the wrongful death of their mothers, this same right was due illegitimates. This evidences the fact that the statutory right to bring a wrongful death action is substantial enough to warrant constitutional protection. This right to bring a wrongful death action would be illusory if the state is allowed to conclusively deny posthumous illegitimates standing to assert this right through the use of a conclusive presumption.

Four years after Levy, in Stanley v. Illinois, 405 U.S. 645 (1972), this court recognized a father's basic human liberty in the companionship, care, custody and management of his children and required individualized fact finding to protect this liberty. The child's liberty interest in his own care, custody and management is on the same plane as his father and is likewise deserving of the protection afforded by individualized fact finding. Thus, the state in conferring the right to recover for the loss of companionship, care and custody must use more individualized means to determine standing and may not rely on a presumption which in operation bars posthumous illegitimates from exercising this basic liberty.

2. The state has reasonable alternative means of establishing the father-child relationship for wrongful death purposes.

Where a liberty deserving of protection is involved, the state cannot rely on a conclusive presumption where there are other reasonable means that could be used. This court in Vlandis v. Kline, 412 U.S. 441, 451 (1973), stated:

> [2] In Stanley v. Illinois, supra, however, the Court stated that "the Constitution recognizes higher values than speed and efficiency." . . . The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised.

As was discussed earlier within an equal protection context, there are other reasonable, practicable and accepted means of establishing the father-child relationship than through the use of a conclusive presumption. Posthumous paternity hearings could be held for the limited purpose of establishing the relationship for wrongful death standing. By using this alternative administrative means of establishing the relationship, the statute would not unreasonably infringe upon a liberty deserving of protection and the state's interests would not be compromised.

Because the statutory conclusive presumption infringes upon a basic human liberty, is not necessarily or universally true in fact, and reasonable alternatives exist, Wis. Stats. §852.05(1) denies this class of posthumous illegitimates due process of the law guaranteed to them by the Fourteenth Amendment.

Conclusion

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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Attorneys for Appellant

PROOF OF SERVICE

As shown by the separately filed Proof of Service, which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.

Counsel for Appellant

No. 77-351

August Term, 1977

STATE OF WISCONSIN IN SUPREME COURT

ERIC STEWART ROBINSON, a minor,
by his Guardian ad litem, EDWARD J. COE,

Plaintiff-Respondent,

v.

PATRICK A. KOLSTAD and ALLSTATE
INSURANCE COMPANY,

Defendants-Appellants.

APPEAL from an order of the county court of Barron county:

FRED VAN SICKLE, County Judge. Reversed.

This is an appeal from an order denying the motion of Patrick A. Kolstad and his insurer, Allstate Insurance Company, defendants-appellants, to dismiss a complaint in a statutory wrongful death action. The plaintiff-respondent, Eric Stewart Robinson, an unborn illegitimate child at the time of the death of his putative father, Keith Larson, seeks to recover damages for the wrongful death of Larson, who was killed in an automobile collision involving Kolstad.

The appellants' motion to dismiss was based upon the fact that the status of the plaintiff as the child of the putative father had not been established in accordance with the provisions of sec. 852.05 (1), Stats. The trial court, in denying the motion to dismiss, declared sec. 852.05 (1) to be unconstitutional as a denial of equal protection of law.

CONNOR T. HANSEN, J. The facts alleged, and assumed to be true for purposes of the motion to dismiss, are substantially as follows:

The decedent, Keith Larson, kept steady company with the plaintiff's mother, Susan Robinson Taft, nee Robinson, for more than a year prior to his death. They planned to be married when Larson reached majority on March 29, 1973, and Larson had asked a friend to be the best man at the wedding.

On October 13, 1972, Susan Taft became eighteen years old. She had spent the night at Larson's home on several occasions previously, and after her eighteenth birthday spent every night with him. She had sexual relations with Larson and with no other man.

Taft soon suspected she was pregnant. On October 27, 1972, Larson drove her to a doctor, who administered a pregnancy test which was paid for by Larson. The doctor informed Taft that she was pregnant, and she told him she planned to marry soon.

Larson did not queston that he was the father of the child. He planned to marry Taft as soon as his mother would consent; if she denied consent, he planned to be married when he reached majority. He and Taft told friends that he would be the child's father and that he and Taft were to be married.

Two days after Taft learned she was pregnant, on October 29, 1972, Larson was killed in a collision involving a pickup truck driven by defendant-Kolstad. The complaint alleges the collision was the result of Kolstad's negligence.

The plaintiff, Eric Robinson, was born June 16, 1973.

On August 3, 1973, Larson's mother, a recognized lineal heir under the Wisconsin statutes, commenced a wrongful death action against the defendants. On July 15, 1974, that action was dismissed upon stipulation of the parties and upon payment by the defendant, Allstate Insurance Company, of $7,654.81 in settlement of the wrongful death claim.

On December 30, 1976, the instant action was commenced.

This appeal concerns the narrow question of whether a posthumous

illegitimate child may maintain an action for the death of his putative father under the wrongful death statutes. Secs. 895.01, 895.03 and 895.04, Stats. 1/

In defining the party-plaintiffs in a wrongful death action, sec. 895.04 (2), Stats., provides that the amount recovered in such action belongs ". . . to the deceased's lineal heirs as determined by s. 852.01 . . . " if there is no surviving spouse.

In Krantz v. Harris, 40 Wis. 2d 709, 162 N.W. 2d 628 (1968), this court held that a decedent's "lineal heirs" are to be determined, in the case of an illegitimate child, by the provisions of sec. 237.06, Stats. 1967, now sec. 852.05 (1). That section provides:

" 852.05 Status of illegitimate person for purposes of intestate succession. (1) An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by intestate succession from and through (a) his mother, and (b) his father if the father has either been adjudicated to be such under ss. 52.21 to 52.45, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him."

The attorney general has filed a brief amicus curiae urging that sec. 852.05 (1) and ch. 52, Stats., be construed to permit the commencement of a paternity proceeding after the death of the putative father. This question was considered in the consolidated appeals of In Re Estate of Blumreich and Caldwell v. Estate of Blumreich, 84 Wis. 2d 545, ___ N.W. 2d ___ (1978). [mandated even date herewith]

The Blumreich Cases, supra, held that a posthumous paternity proceeding would be contrary to the provisions of ch. 52 and the holding of this court in Krantz v. Harris, supra, and inconsistent with the policy determinations of the legislative enactments. The Blumreich holding is controlling on this issue and requires the rejection of the argument that ch. 52 should be construed to permit a posthumous paternity proceeding.

1/ Subsequent to the death of the plaintiff's putative father, Keith Larson, sec. 895.04 (4), Stats., was amended, by Laws of 1975, ch. 287, effective June 2, 1976, so as to increase the additional damages for loss of society and companionship from not to exceed $5,000 to not to exceed $10,000.

In Re Estate of Blumreich and Caldwell v. Estate of Blumreich, supra, also presented the question of whether the Wisconsin Wrongful Death Act and sec. 852 .05 (1), Stats., deny equal protection or due process of law. Those cases involved an illegitimate child born after the death of his putative father. The child sought to commence an action for the wrongful death of the putative father and to inherit from his estate, but was unable to satisfy the requirements of sec. 852.05 (1), Stats. This court rejected the argument that those requirements deny after-born illegitimates equal protection or due process of law. That holding is dispositive of this issue on this appeal.

Sec. 852.05 (1), Stats., prescribes reasonable means of proof of paternity for illegitimate children. There is no separate statutory classification for children born out of wedlock. Under no construction of the statutes can it be said that there is a statutory disinheritance of illegitimate children. In addition to the legitimization of children by such procedures as subsequent marriage of the parents and adoption, sec. 852.05 (3), paternity may be shown by an adjudication in paternity proceedings, by oral or written admissions of the father in open court, or by acknowledgment in writing signed by the putative father without a witness. The only types of proof excluded by the statutes are oral admissions outside of court or unsigned written acknowledgments. Sound policy reasons for these legislative exclusions are readily apparent.

The constitutional provisions, both state and federal, for the protection of individuals, involve difficult questions of balancing, and the particular facts in the instant case make it especially so. However, every law enacted, unless it applies to all persons at all times and in all places, inevitably affects some and does not affect others.

If it could be said that the legislative enactment categorically disinherited posthumous illegitimate children, the argument of denial of equal protection under either the fourteenth amendment to the United States Constitution or art. I, sec. 1 of the

Wisconsin Constitution would rise to a different dimension.[2/] We do not believe the classifications reflected in the statutes under consideration are proscribed by either state or federal constitutional provisions. The statutes accord illegitimate children the same rights accorded children born in wedlock, provided only that they establish their parentage in a manner recognized by the statutes. In prescribing reasonable methods of proving parentage, the statutes serve legitimate legislative purposes.

The fact that the statutes do not alleviate all difficulties, or that they might have provided otherwise, does not ipso facto make them a denial of equal protection.

Finally, the plaintiff contends that an action for the wrongful death of a father may be maintained by a child who was unborn at the time of the father's death, whether or not the unborn child was a viable fetus at the time of the father's death; the defendants argue that a nonviable fetus is not a "person" as that term is used in the fourteenth amendment to the United States Constitution and that such a fetus is incapable of maintaining an action for a wrongful death occurring before the fetus was viable.

This question is not specific to unborn illegitimate children. The arguments of the respective parties are fully applicable to any unborn child, legitimate or illegitimate.

In view of our decision in the Blumreich Cases, supra, it is unnecessary to resolve this question. Sec. 852.05 (1), Stats., sets forth the exclusive methods by which paternity of illegitimate children can be established. The complaint in the instant case does not allege facts sufficient to satisfy any of these statutory requirements. In the absence of such allegations, the instant complaint is fatally deficient. Any question as to the ability of an after-born child to maintain a wrongful death action is thus rendered moot, whether the unborn child was viable or nonviable at the time of the alleged wrongful death.

Because the instant complaint fails to allege facts sufficient to comply with the statutory requirements, the complaint fails to state a claim on which relief can be granted. The plaintiff acknowledges that he can not meet the burden of proof required by sec. 852.05 (1), Stats. Therefore, the trial court erred in denying the motion to dismiss. The order denying the motion to dismiss the complaint must be reversed.

By the Court.--Order reversed, with directions to dismiss the complaint.

2/ Art. I, sec. 1 of the Wisconsin Constitution is substantially equivalent to the fourteenth amendment to the United States Constitution. State ex rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 49, 132 N.W. 2d 249 (1965).

No. 77-351

August Term 1977

STATE OF WISCONSIN : IN SUPREME COURT

ERIC STEWART ROBINSON, a minor,
by his Guardian ad litem, EDWARD J. COE,

Plaintiff-Respondent,

v.

PATRICK A. KOLSTAD and
ALLSTATE INSURANCE COMPANY,

Defendants-Appellants.

DAY, J. (dissenting)

I dissent in this case for the same reasons I explained in Caldwell v. Kaquatosh, and Caldwell v. Blumreich, (No. 75-728 and No. 76-068, even date), 84 Wis. 2d 545, ___N.W. ___(1978). Sec. 852.05(1), Stats. (1975) denies posthumous illegitimates equal protection and due process. Having found sec. 852.05(1) unconstitutional, I would hold that a posthumous illegitimate may bring a declaratory judgment action to have his paternity established.

The facts of this case, even more than those in the Blumreich cases, show how sec. 852.05(1), Stats. denies equal protection and due process to posthumous illegitimates such as Eric Robinson. Robinson's mother, Susan Taft, had sexual relations with no man other than Keith Larson prior to October 27, 1972. On that day, Susan Taft was given a pregnancy test that Mr. Larson paid for. The test showed that she was pregnant. Larson never questioned that he was the father of the child. He told friends that he was the father and that he and Ms. Taft were going to be married.

On October 29, 1972, two days after Larson found out that Ms. Taft was pregnant, he was killed in a car-truck collision. At the time of Larson's death, the receipt from the pregnancy test was in his billfold.

The majority opinion holds that sec. 852.05(1), Stats. does not deny Eric Robinson equal protection or due process.

"We do not believe the classifications reflected in the statutes under consideration are proscribed by either state or federal constitutional provisions. The statutes accord illegitimate children the same rights accorded children born in wedlock, provided only that they establish their parentage in a manner recognized by the statutes."

Sec. 852.05(1) does not accord illegitimate children the same rights. Illegitimate children may not inherit from or recover for the wrongful death of their fathers unless there is a paternity adjudication or an acknowledgment in writing or in open court. With any posthumous illegitimate, these are nearly impossible requirements. A pre-natal paternity proceeding is as unlikely as the written acknowledgment of a fetus.

In this case, the requirements of sec. 852.05(1) are especially onerous. Less than forty-eight hours passed from the time that Larson found out that Ms. Taft was pregnant until Larson died in the collision. During that time Larson was required by 852.05(1) to be adjudged the father in a paternity action or to acknowledge in writing that the fetus of Eric Robinson would one day be his child. As might be expected, Larson failed to meet the requirements of the statute. This failure means that Eric Robinson is forever barred from inheriting from his father and from receiving wrongful death benefits. In terms of equal protection, sec. 852.05(1) creates invidious discrimination against posthumous illegitimates. In terms of due process the statute creates an irrebuttable presumption that prevents posthumous illegitimates from establishing their paternity. Blumreich, supra.

I would affirm the order of the trial court.

I am authorized to state that Justice Shirley S. Abrahamson concurs in this dissent.

STATE OF WISCONSIN COUNTY COURT BARRON COUNTY

ERIC STEWART ROBINSON,
a minor, by his Guardian
ad Litem, EDWARD J. COE,

Plaintiff,

vs.

PATRICK A. KOLSTAD
1152 Elm Street
Cumberland, Wisconsin,

and

ALLSTATE INSURANCE COMPANY
P. O. Box 764
Milwaukee, Wisconsin,

Defendants.

ORDER ON MOTION TO DISMISS BY THE DEFENDANTS

Defendants have moved to dismiss Plaintiff's Complaint on the grounds that it does not state facts sufficient to constitute a cause of action.

The Court would remark that the attorneys for both sides of this question argued and briefed the question very ably.

Plaintiff, who is an illegitimate child, by his Guardian ad Litem brings an action for the wrongful death of his father, which occurred when the plaintiff was then a fetus in his mother's womb about six weeks.

It seems to this Court that the basic question was recently decided by the United States Supreme Court in the case of Deta Mona Trimble and Jessie Trimble, Appellants, vs. Joseph Roosevelt Gordon et al.

Although the facts are different, I believe that when the United States Supreme Court decided in the foregoing case that to put legitimate persons in one classification and illegitimate persons in a different classification, is to deny the illegitimate person the equal protection of the law as provided in the United States Constitution.

Accordingly, defendants' motion to dismiss is denied.

Dated August 4, 1977.

BY THE COURT:

Fred Van Sickle

FRED VAN SICKLE, Judge

STATE OF WISCONSIN IN SUPREME COURT

ERIC STEWART ROBINSON, a minor by his Guardian ad Litem, EDWARD J. COE,

Plaintiff-Respondent,

v.

PATRICK A. KOLSTAD and ALLSTATE INSURANCE COMPANY,

Defendants-Appellants.

NOTICE OF APPEAL AND REQUEST TO CLERK TO CERTIFY AND TRANSMIT ENTIRE RECORD

Case #77-351

TO: Clerk of the Supreme Court
State Capitol
Madison, WI 53702

John W. Krueger, Esq.
Attorney for Patrick A. Kolstad and
Allstate Insurance Company
121 South Brown Street
Rhinelander, WI 54501

Bronson C. LaFollette, Esq.
Attorney General for the State of Wisconsin
114 East, State Capitol
Madison, WI 53702

I. Notice is hereby given that Eric Stewart Robinson, a minor by his Guardian ad Litem, Edward J. Coe, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Wisconsin Supreme Court of June 30, 1978, reversing an order of the County Court of Barron County.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, the Clerk is requested to certify and transmit to the Supreme Court of the United States the entire record of the proceedings herein.

Dated this 24th day of August, 1978.

AXLEY, BRYNELSON, HERRICK & GEHL

James C. Herrick

James C. Herrick
Attorneys for Appellant, Eric Stewart Robinson, a minor by his Guardian ad Litem
122 West Washington Avenue
Post Office Box 1767
Madison, WI 53701

Nos. 75-728 and 76-068

August Term, 1977

STATE OF WISCONSIN IN SUPREME COURT

In Re: ESTATE OF HERMAN BLUMREICH, Deceased:

HERMAN CALDWELL, by his Guardian ad Litem, FREDERIC C. EBERLEIN,

Appellant,

75-728 v.

HELEN KAQUATOSH, Personal Representative of the Estate of Herman Blumreich, Deceased, et al.,

Respondents.

HERMAN CALDWELL, an Infant, by FREDERIC C. EBERLEIN, Guardian ad Litem,

Appellant,

76-068 v.

ESTATE OF HERMAN BLUMREICH, Deceased; HELEN KAQUATOSH, Personal Representative,

Respondent.

APPEALS from two orders of the county court of Shawano-Menominee county: EDWARD P. HERALD, County Judge of Oconto county, Presiding; and RALPH J. STRANDBERG, County Judge of Langlade county, Presiding. Affirmed.

This is a consolidation of two appeals concerning the rights and status of an illegitimate child born after the death of his putative father. The petitioner-appellant, Herman Caldwell (hereinafter petitioner), is an illegitimate minor child and the putative son of Herman Blumreich, who was killed in an automobile accident some eleven weeks before the petitioner was born.

CONNOR T. HANSEN, J.

The petitioner, by his guardian ad litem, petitioned the Shawano-Menominee county court, probate branch, EDWARD P. HERALD, County Judge of Oconto county, Presiding, for a support allowance from the estate of the decedent, Herman Blumreich, and for a determination that he is the sole surviving heir of the decedent. The petition was denied.

Thereafter, the petitioner commenced an action for declaratory relief in the county court of Shawano-Menominee county, RALPH J. STRANDBERG, County Judge of Langlade county, Presiding, seeking a determination that he is the son of the decedent, Herman Blumreich; that he is entitled to inherit from the decedent's estate in the same manner as a legitimate child; and that he is eligible to commence an action for the wrongful death of the decedent. The petitioner's complaint was dismissed on the ground that the petitioner had not alleged facts sufficient to meet the requirements of proof set forth in sec. 852.05 (1), Stats., and that in the absence of such an allegation, a posthumous determination of paternity would not terminate the controversy or confer any rights of heirship.

The petitioner appeals from the order dismissing his complaint in the declaratory judgment action and from the order denying his petition in the estate proceedings, and the appeals have been consolidated for decision by this court.

The pertinent facts, as they appear from offers of proof made in the estate proceeding, are alleged to be as follows:

Delores Caldwell, the mother of the petitioner, kept steady company with the decedent, Herman Blumreich, throughout 1972 and 1973. They spent many nights together and in June, 1973, were living together. At that time, Delores Caldwell became pregnant. The only man with whom she had intercourse during the period of conception was the decedent, Herman Blumreich.

The decedent told acquaintances that he was the father of the unborn child and that he and Delores planned to marry before the child was born. However, he made no written acknowledgment of paternity; he made no admission of paternity in open court; and there was no adjudication of paternity.

The decedent, Herman Blumreich, was killed in an automobile accident on January 9, 1974. The petitioner, Herman Caldwell, was born to Delores Caldwell on March 31, 1974.

Herman Blumreich left an estate with a value of approximately $17,000. He was survived by two sisters, a brother, and two nieces, and by the petitioner, Herman Caldwell, whose rights are the subject of these appeals.

On appeal, the petitioner argues that he should be permitted to establish paternity by means of an action for declaratory judgment, and that he is eligible for a support allowance under secs. 861.31 and 861.35, Stats. In addition, he argues that sec. 852.05 (1) denies equal protection and due process of law to an illegitimate child born after the death of his putative father.

Briefs in opposition to the petitioner's arguments have been filed by the personal representative of the decedent's estate, and by the decedent's two minor nieces, by their guardian ad litem. Briefs amici curiae have been filed by Wisconsin Judicare, Inc., and by Denissen, Kranzush, Mahoney & Ewald, S.C., representing the decedent's insurer. These briefs challenge and defend the constitutionality of sec. 852.05 (1), Stats., respectively.

The following issues are presented:

1. May an illegitimate child take by intestate succession from the estate of his putative father, and maintain an action for the wrongful death of the putative father, where paternity has not been established as provided in sec. 852.05 (1), Stats., during the life of the putative father?

2. May an illegitimate child whose paternity has not been established as provided in sec. 852.05 (1), Stats., during the life of his putative father, receive an allowance for support and education from the estate of the putative father?

3. Does sec. 852.05 (1), Stats., deny posthumous illegitimate children equal protection or due process of law?

ledged by the father in a signed writing. In Krantz v. Harris, 40 Wis. 2d 709, 714, 162 N.W. 2d 628 (1968), this court held that an illegitimate child must satisfy these requirements to maintain an action for the wrongful death of his putative father. 2/

Herman Blumreich did not acknowledge paternity of the petitioner in open court or in a signed writing, and there was no adjudication of paternity prior to Blumreich's death. It is the petitioner's position, however, that sec. 852.05 (1), Stats., should be construed to permit him to establish paternity by means of a posthumous action for a declaratory judgment, and that such a construction is necessary to afford him reasonable opportunity to establish that he is the son of the decedent. It might similarly be argued that secs. 52.21 to 52.45 could be construed to permit the posthumous commencement of a paternity action against the estate of the putative father.

However, these approaches are foreclosed by the plain language of the statutes and by the controlling decision of this court in Krantz v. Harris, supra. In Krantz, a posthumously-born illegitimate child sought to maintain an action for the wrongful death of his putative father. This court held that such an action could be maintained only if the child had been legitimated by marriage or if paternity had been established as provided in sec. 237.06, Stats. 1967, the precursor of sec. 852.05, Stats. 1975.

1/ Sec. 852.05 (1), Stats., provides:

" 852.05 Status of illegitimate person for purposes of intestate succession. (1) An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by intestate succession from and through (a) his mother, and (b) his father the father has either been adjudicated to be such under ss. 52.21 to 52.45, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him."

A child may also be legitimated by the subsequent marriage of his parents. Secs. 245.25 and 852.05 (3).

2/ Sec. 895.04, Stats., provides in relevant part:

" 895.04. Plaintiff in wrongful death action. (1) An action for wrongful death may be brought by the personal representative of the deceased person or by the

Any argument that sec. 852.05, Stats., contemplates the commencement of a ch. 52 paternity proceeding after the death of the putative father was rejected by implication in Krantz, supra. In Krantz it was assumed, for purposes of a demurrer, that the child was in fact the child of the decedent. Nevertheless, it was held that the child could not meet the statutory burden of proof for establishing heirship, clearly implying that no posthumous paternity proceeding was available.

This conclusion is consistent with the provisions of ch. 52, Stats. Paternity proceedings must be conducted in the manner prescribed by the legislature, State ex rel. Lyons v. De Valk, 47 Wis. 2d 200, 177 N. W. 2d 106 (1970). Chapter 52, Stats., in its entirety demonstrates that such a proceeding is to be maintained during the life of the putative father. Among other things, that chapter provides for the apprehension of the alleged father and for his release on bail and permits him to cross-examine the complainant. Secs. 52.24 to 52.27. Further, a paternity proceeding may not be maintained when the district attorney declines to prosecute. State ex rel. Smith v. Chicks, 70 Wis. 2d 833, 235 N.W.2d 694, 239 N.W.2d 9 (1975). Clearly, the legislature did not contemplate that such a proceeding would be commenced posthumously by a putative illegitimate child.

This is in harmony with decisions in other states, which:

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person to whom the amount recovered belongs.

"(2) . . . the amount recovered shall belong and be paid to the spouse of the deceased; if no spouse survives, to the deceased's lineal heirs as determined by s. 852.01; . . ." (Emphasis added.)

In the case of an illegitimate child, the "lineal heirs" of a decedent are determined by the provisions of sec. 852.05, Stats., formerly sec. 237.06, Stats. 1967. Krantz v. Harris, supra, at 714.

". . . are almost unanimous that a filiation or bastardy proceeding may not be instituted after the death of the putative father, so as to charge his estate with the duty to support the illegitimate." Annot., 58 A.L.R. 3d 188, 191 (1974). See, e.g.: Carpenter v. Sylvester, 267 So. 2d 370 (Fla. App. 1972); Toms v. Lohrentz, 37 Ill. App. 2d 414, 185 N.E. 2d 708 (1962).

It is also significant that sec. 895.01, Stats., concerning survival of actions generally, does not identify paternity actions as surviving the death of the father.

Nor is an action for declaratory relief appropriate. The petitioner relies upon Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W. 2d 9 (1974). In that case, this court held that the putative father of an illegitimate child was entitled to maintain a declaratory judgment action seeking a determination that he was the child's father. This holding was premised on the absence of any other procedure by which the father could establish his rights and duties.

The petitioner maintains that it is effectively impossible for an after-born illegitimate child to satisfy the requirements of sec. 852.05 (1), Stats., and that, as in Slawek, supra, a declaratory judgment action should be permitted. In the present case, however, the petitioner does not seek merely a legal forum for vindication of his rights, but rather a revision of the substantive statutory criteria by which those rights are determined.

In effect, the petitioner asks this court to engraft onto the plain language of sec. 852.05 (1), Stats., a fourth method of establishing paternity. On its face, the statute provides three methods by which paternity may be shown, and it cannot be said as a matter of law that an after-born child will be unable to meet any of these statutory requirements, or that an alternative avenue is necessary to provide a forum for vindication of the child's rights.

In Larson v. ILHR Department, 76 Wis. 2d 595, 252 N.W. 2d 33 (1977), this court held that an illegitimate posthumously-born child was not a dependent entitled to payment of death benefits under the Worker's Compensation Act on the death of the putative father. This court emphasized that worker's compensation is wholly statutory in nature, and that the classifications and requirements for eligibility created by the legislature are exlusive.

Similarly, the law of descent and distribution is of legislative origin and subject to the control of the legislature; see: Estate of Topel, 32 Wis 2d 223, 230, 145 N.W. 2d 162 (1966), and a cause of action for wrongful death is purely statutory. Krantz v. Harris, supra, at 714. As in Larson, supra, therefore, the criteria prescribed by statute must be considered exclusive in the absence of any constitutional infirmity.

II.

The petitioner next contends that regardless of his ability to inherit from the decedent's estate or to maintain an action for wrongful death, he is eligible to receive a support allowance from the estate under secs. 861.31 and 861.35, Stats. Sec. 861.31 (1) authorizes the probate court to order an allowance "for the support of the surviving spouse and any minor children of the decedent during the administration of the estate"; sec. 861.35 allows the court to order an allowance "for the support and education of each minor child until he reaches a specified age, not to exceed 18. . . ."

The petitioner maintains that he is a minor child of the decedent eligible to receive an allowance under these provisions. As authority for this proposition, he cites In Re Woodward's Estate, 230 Cal. App. 2d 113, 40 Cal. Rptr. 781 (1964). There, a California District Court of Appeal held that an illegitimate child came within the class of "minor children" of a decedent entitled to allowances from the decedent's estate. Although the child was ineligible to inherit under the relevant statute, the California court held that the right to a family allowance is not equivalent to, or dependent upon, the right to inherit. Rather, the court held, it is an extension of the parent's obligation of support, and extends to an illegitimate minor child. Emphasizing that the family allowance is favored by the law and is to be liberally construed, the court concluded that the statutory term "minor children," a term capable of embracing both legitimate and illegitimate childre.., evinced an intention to include the latter.

We do not find this reasoning persuasive. There is nothing in secs. 861.31 and 861.35, Stats., to indicate that the category of "minor children" entitled to allowances from a decedent's estate is larger than the category of children entitled to inherit from the decedent. To recognize different methods of establishing paternity for

different purposes, as the holding in In Re Woodward's Estate, supra, appears to do, would be to create an inexplicable anomaly. We do not believe the legislature intended to permit a support allowance to be granted on the basis of posthumous proof of informal verbal acknowledgment of paternity, when such proof is excluded for purposes of establishing heirship and maintaining a wrongful death action.

It is more reasonable to conclude that secs. 852.05 (1), 861.31 and 861.35, Stats., are to be read in pari materia. The references to "minor children" in secs. 861.31 and 861.35 leave undefined the manner in which an illegitimate applicant for an allowance may establish that he is, in fact, the child of a decedent. In the absence of any indication to the contrary, we conclude that the legislature intended that such applicants establish their paternity in the manner prescribed by sec. 852.05 (1). Because the instant petitioner has not satisfied these statutory requirements, he is ineligible to receive an allowance under secs. 861.31 or 861.35. 3/

III.

The petitioner contends that sec. 852.05 (1), Stats., as it affects both heirship and wrongful death actions, denies posthumously-born illegitimates equal protection and due process of law as guaranteed by the fourteenth amendment to the United States Constitution and by art. I, sec. 1 of the Wisconsin Constitution. 4/

3/ The briefs of amicus curiae, Denissen, Kranzush, Mahoney & Ewald, S.C., and of the decedent's nieces, Rachel Powless and Josephine Powless, by their guardian ad litem, rely by analogy upon sec. 895.04(2), Stats., as construed by this court in Krantz v. Harris, supra, for the proposition that no allowance may be ordered where there is no surviving spouse of the decedent. This construction is unreasonable in that it would preclude an allowance for any child, legitimate or illegitimate, where both spouses are deceased. Moreover, it is contrary to the plain language of secs. 861.31 (2) and 861.35, which expressly provide for allowances and allotments to minor children where no spouse survives the decedent.

4/ The record in the declaratory judgment action does not show that the attorney general was served with a copy of the proceeding. Such service is required by sec. 806.04 (11), Stats., whenever the constitutionality of a statute is put in issue in a declaratory judgment action and is essential to the subject matter jurisdiction of the courts. O'Connell v. Bd. of Ed., Jt. Dist. #10, 82 Wis. 2d 728, 733, 264 N.W. 2d 561 (1978).

The substance of the declaratory judgment action, as is clear from the complaint itself and from the petitioner's arguments on this appeal, is a constitutional challenge to sec. 852.05 (1), Stats. Although the complaint did not, in so many words, request a declaration that the statute is unconstitutional, that was the gravamen of the action, and the purpose of the statute must control over the pleading techniques of the parties. O'Connell v. Bd. of Ed., Jt. Dist. #10, supra, at 735.

In these circumstances, the attorney general was entitled to be served. In the absence of such service, this court is without jurisdiction to consider the constitutional arguments advanced in that action. It is only because the constitutional issues were also raised in the estate proceeding that we consider them here.

In a series of cases beginning with Levy v. Louisiana, 391 U.S. 68 (1968), the United States Supreme Court has considered the constitutionality of statutory classifications based on illegitimacy. These decisions establish that statutes such as sec. 852.05 (1), Stats., are not subject to the strict scrutiny applied where such suspect criteria as race or national origin are involved. Although the standard of review "is not a toothless one," classifications based on illegitimacy fall "in a realm of less than strictest scrutiny." Mathews v. Lucas, 427 U.S. 495, 510 (1976).

The most recent of the Supreme Court cases, and the most relevant to the present question, is Trimble v. Gordon, 430 U.S. 762 (1977). In Trimble, the Supreme Court overturned provisions of the Illinois Probate Act which precluded an illegitimate child from inheriting by intestate succession from his or her father unless the child had been both legitimated by the inter-marriage of the parents and acknowledged by the father. The appellant in Trimble, Deta Mona Trimble, was an illegitimate minor girl whose parents had not married and who therefore was unable to inherit from the estate of her deceased father, despite the fact that she had been adjudicated to be his daughter in a paternity proceeding conducted during his lifetime.

This statutory discrimination against illegitimates could not be justified by reference to the state's interest in protecting the sanctity of marriage and the integrity of the family unit, the Supreme Court held. The Court reiterated previous holdings that a state may not attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. Such efforts are not only unjust, but also ineffectual, inasmuch as illegitimate children can affect neither their parents' conduct nor their own status. Trimble v. Gordon, supra, at 768-770.

The Supreme Court recognized, however, that statutory distinctions based on illegitimacy may have other, more substantial, justifications. The Court recognized the state's legitimate interest in establishing a method of property disposition, and said:

"The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." Trimble v. Gordon, supra, at 771.

More specifically, the Court recognized that the difficulty of proving paternity and the related danger of spurious claims are particularly acute in the case of illegitimate children of intestate men. The court acknowledged that:

"The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. . . ." Trimble v. Gordon, supra, at 770.

In addition, the Court was sensitive to the necessity of drawing arbitrary lines to facilitate the potentially difficult problems of proof lurking in inheritance proceedings. Trimble v. Gordon, supra, at 771.

The state thus has valid interests in preventing fraud, resolving problems of proof and regulating the disposition of property at death. While these interests will not excuse otherwise invidious discrimination, they will sustain an enactment which "does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. . . " Mathews v. Lucas, supra, at 513. To survive constitutional review, a statute must not unnecessarily exclude significant categories of illegitimates whose inheritance rights could be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing by intestacy. Trimble v. Gordon, supra, at 771. The Illinois statute under consideration in Trimble, supra, did not meet this standard because it unnecessarily and inexplicably excluded illegitimates such as Deta Mona Trimble, whose paternity had been established in a state court paternity action and whose claim would not in any way compromise the accurate and efficient disposition of the decedent's estate.

In striking down the Illinois statute, the Supreme Court made clear, however,

that states may prescribe reasonable requirements regarding the proof of paternity. The Court said:

"Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the State's interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." Trimble v. Gordon, supra, at 772, fn. 14.

Applying these principles to the instant case, we conclude that sec. 852.05 (1), Stats., constitutes a "carefully turned" statute sensitive to the conflicting considerations emphasized in Trimble, supra. There is no evidence that this statute reflects an impermissible effort to influence the conduct of parents by imposing sanctions on their illegitimate children. Indeed, the statutory provisions do not distinguish between legitimates and illegitimates so much as they distinguish among various categories of illegitimates, and they specifically allow proof of paternity by either of the two methods identified in Trimble, supra, as accurate and reliable: prior adjudication and formal acknowledgment.

We believe the exclusion of other forms of posthumous proof of paternity represents a reasonable effort ". . . to eliminate imprecise and unduly burdensome methods of establishing paternity." Trimble v. Gordon, supra, at 772, fn. 14. It has been said that the accusation of paternity is easy to make but difficult to defend against. See, e.g.: In re Commissioner of Social Services, 70 Misc. 2d 581, 333 N.Y.S. 2d 621, 623 (1972). To permit paternity to be established after the death of the putative father, on the basis of his alleged informal, verbal statements would be to place his estate at an unreasonable disadvantage in defending against spurious claims. The decedent would be unavailable to assert defenses or to assist in the cross-examination of his accusers. Information about his blood, which might conclusively eliminate him as the father, might not be available to his estate. His death thus undermines the reliability of the fact-finding process, and it is not unreasonable to require that a posthumous claim of paternity be supported by the types of documented evidence approved under sec. 852.05 (1), Stats.

In addition, the statutory methods of proof avoid the extended uncertainty which would otherwise plague estate proceedings and wrongful death actions. It is apparently the petitioner's position that paternity may be established on the basis of undocumented evidence adduced at any time during the applicable period of limitations.[5/] Such an approach would produce intolerable confusion. Potential heirs and claimants could not be identified with confidence until after the period of limitations had elapsed. The lurking possibility that an unknown putative child would come forward at some future time would frustrate the orderly settlement of estates and resolution of wrongful death claims. By requiring that paternity be evidenced in a recorded form during the father's life, sec. 852.05 (1), Stats., reduces the likelihood that an unexpected claimant will appear years in the future. The statute thus serves the state's substantial interest in providing for the prompt and definitive determination of the valid ownership of property left by decedents, and such statutes are entitled to a degree of judicial deference. Trimble v. Gordon, supra, at 767, 768, fn. 12.

Proof of paternity by posthumous second-hand testimony would be imprecise, unreliable and susceptible to fraudulent claims, and would inject intolerable uncertainty into estate proceedings and wrongful death actions. Because such posthumous proof would compromise the valid interests of the state, it is not unreasonable to require that paternity be adjudicated, or acknowledged in open court or in writing by the putative father.

5/ An action for wrongful death must generally be brought within three years after the wrongful act, neglect or default. Sec. 893.205 (2), Stats. However, sec. 893.33 (1) tolls statutes of limitations for persons under the legal disability of infancy and permits them to bring actions within one year after they reach the age of majority. Authorities are divided as to whether such a general savings provision is applicable to a statute of limitations for wrongful death actions, see: Annot. 132 A.L.R. 292, sec. III, pp. 317-320 (1941), and 22 Am. Jur. 2d, Death, sec. 45, pp. 639, 640, and it is unnecessary to resolve that question here. At a minimum, the approach proposed by the petitioner would allow him to prove his undocumented paternity at any time within three years after the alleged wrongful act.

This conclusion is buttressed by the decision of the New York Court of Appeals in Matter of Estate of Lalli, 43 N.Y. 2d 65, 400 N.Y.S. 2d 761 (1977), probable jurisdiction noted, ___U.S. ___, 98 Sup.Ct. 1482 (1978), and by the decision United States Supreme Court in Mathews v. Lucas, supra.

In Lalli, supra, currently on appeal to the Supreme Court, the New York Court of Appeals considered the constitutionality of a New York inheritance statute which denied an illegitimate child the right to inherit from his or her intestate father's estate unless an adjudication of paternity had been made during the father's lifetime. The New York court concluded that this requirement, substantially more restrictive than those of sec. 852.05 (1), Stats., was consistent with the constitutional principles elaborated in Trimble v. Gordon, supra.

The New York court emphasized that the statute in question was not an expression of impermissible hostility to illegitimacy as such. Instead, the focus of the New York statute was on the form and manner, and thus the trustworthiness, of the proof of paternity; the statute was concerned "only with proof of paternity and the establishment of a blood relationship between the father and the child." Matter of Estate of Lalli, supra, at 763.

This observation is equally true of sec. 852.05 (1), Stats. The methods of proof prescribed there do not represent a moral, social or ethical disparagement of illegitimacy, and are not intended to mold the conduct of the parents. They are intended only to serve the state's legitimate interest in the accurate and orderly settlement of estates by requiring that paternity be established with a degree of formality and in a recorded form which will assure reliability and avoid extended uncertainty.

The New York statute considered in Lalli, supra, required that paternity be established during the life of the father. The New York court rejected the argument that such a requirement was constitutionally impermissible:

". . . Nor do we perceive the seeds of constitutional infirmity in the requirement that the judicial determination be made within the lifetime of the father. As we noted before, the father 'may be expected to have greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing

to the reliability of the fact-finding process.' . . . Indeed a formal acknowledgement of paternity, apparently found in Trimble to be an acceptable requirement, obviously entails personal participation by the father during his lifetime." Matter of Estate of Lalli, supra, at 763. (Citations omitted.)

Further support for the classifications set forth in sec. 852.05(1), Stats., can be found in Mathews v. Lucas, supra. In that case, the Supreme Cou.' upheld statutory classifications concerning the right of illegitimate children to receive survival benefits under the Social Security Act upon the death of a wage-earning parent.

Under the statutory scheme in question, benefits were conditions upon a showing that the child was dependent upon the parent at the time of death. Dependency was conclusively presumed for (a) legitimate children, (b) children ineligible to inherit under applicable state intestacy laws, (c) children whose parents' marriage was invalid as a result of some nonobvious defect, (d) children who had been acknowledged in writing, and (e) children whose paternity had been adjudicated during the life of the deceased parent. Illegitimates who did not come within these categories were required to bear the additional burden of making individualized proof of dependency, and the appellee children in Mathews v. Lucas, supra, argued that this constituted unconstitutional discrimination.

The Supreme Court rejected this argument and concluded that the statutory classifications bore a "substantial relation to the likelihood of actual dependency" and reflected "reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parents' death. . . ." Mathews v. Lucas, supra, at 510, 513. The Court stated:

"Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience. While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. . . ." Mathews v. Lucas, supra, at 509.

The requirements of sec. 852.05 (1), Stats., constitute similar presumptions in aid of administrative functions; by requiring that paternity be shown from relatively readily documented facts, they safeguard the accuracy, integrity and finality of intestate succession. Like the statutory classifications upheld in Mathews v. Lucas, supra, sec. 852.05 (1) marks a constitutionally permissible "middle ground between the extremes of complete exclusion and case-by-case determination of paternity." Trimble v. Gordon, supra, at 771.

The instant petitioner further argues that sec. 852.05 (1), Stats., effectively "creates an insurmountable barrier" to inheritance or commencement of a wrongful death action by an illegitimate born after the death of the putative father. Amicus curiae Wisconsin Judicare joins in this argument, and contends that sec. 852.05 (1) denies an after-born illegitimate due process of law because the child has no opportunity to establish his paternity. This "insurmountable barrier" argument is a formulation of the much-criticized "irrebutable presumption doctrine."[6/]

In Trimble v. Gordon, supra, the Supreme Court eschewed this approach. Despite the fact that such an analysis had been employed in several previous opinions, the court concluded that "focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly." Trimble v. Gordon, supra, at 773. The essential inquiry, instead, is a dual one, which gives due consideration to both the legitimate governmental interests promoted by a classification and the personal rights which may be endangered thereby. Mathews v. Lucas, supra, at 504.

We believe the classifications of sec. 852.05 (1), Stats., are equally constitutional under either this approach or the questionable "insurmountable barrier" approach. In Labine v. Vincent, 401 U.S. 532 (1971), the Supreme Court rejected an "insurmountable barrier" challenge to Louisiana inheritance statutes.

6/ See, e.g.: Gunther, Individual Rights in Constitutional Law (2d ed. 1976), at 486-493; Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

". . .There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father, . . ." the Court said, pointing out that a father could leave property to his illegitimate child in any of three ways: by executing a will, by marrying the child's mother, or by stating in his acknowledgment of paternity a desire to legitimate the child. Labine v. Vincent, supra, at 539.

Sec. 852.05 (1), Stats., similarly prescribes alternative methods by which an illegitimate may establish a right to inherit from his father. There is no question that he may inherit if the father executes a will naming him a beneficiary. If the father dies intestate, the child may prove paternity by showing that his parents inter-married, that his father acknowledged paternity in open court or in a signed writing, or that an adjudication of paternity was made during the father's lifetime. These alternative methods of proof are more varied, and certainly no more onerous, than those approved in Labine, supra, and therefore cannot be said to deny the petitioner due process of law.

It follows from what we have said that the probate court was correct in denying the petition of the petitioner. The petitioner's complaint in the declaratory judgment action was properly dismissed because, in the absence of service upon the attorney general, the courts of this state are without jurisdiction to determine the controversy. Accordingly, the orders appealed from are affirmed.

By the Court.--Orders affirmed.

STATE OF WISCONSIN IN SUPREME COURT

No. 75-728

In Re: ESTATE OF HERMAN BLUMREICH,
Deceased:
HERMAN CALDWELL by his Gdn. ad
Litem FREDERIC C. EBERLEIN,

Appellant,

v.

HELEN KAQUATOSH, Personal
Representative of the Estate of
Herman Blumreich, Dec'd. et al.,

Respondents.

No. 76-068

HERMAN CALDWELL, an infant,
by FREDERIC C. EBERLEIN,
Guardian ad Litem,

Appellant,

v.

ESTATE OF HERMAN BLUMREICH,
Deceased,
HELEN KAQUATOSH, Personal
Representative,

Respondent.

DAY, J. (dissenting). The majority holds that Herman Caldwell, an illegitimate child, has no right to inherit from his father, Herman Blumreich, or recover for his father's wrongful death. 1/

1/ For the purposes of this appeal, the allegations in the declaratory judgment complaint must be assumed to be true. Clark v. Corby, 75 Wis. 2d 292, 301, 249 N.W. 2d 567 (1977). The complaint alleges that Herman Blumreich was the father of Herman Caldwell. In the estate proceeding, Herman Caldwell's guardian ad litem offered to prove that Caldwell was the illegitimate son of Herman Blumreich.

If Herman Caldwell were a legitimate child he would at least be able to have a court hear his claims. Because he is a posthumous illegitimate, he is denied that opportunity. Sec. 852.05(1), Stats. (1975), which requires that result, denies Caldwell both equal protection and due process. For these reasons I would hold the statute unconstitutional as applied to posthumous illegitimates. I would also hold that Caldwell has a right to have his paternity established in a declaratory judgment action.

Equal Protection.

The United States Supreme Court has not identified illegitimacy as suspect classification such as race or national origin, but it has struck down a number of classifications based on illegitmacy. In Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509, 20 L.Ed. 2d 436 (1968) and Glona v. Amer. Guarantee & Liability Ins. Co., 391 U.S. 73, 88 S. Ct. 1515, 20 L.Ed. 2d 441 (1968), the court invalidated an interpretation of the Louisiana wrongful death statute that precluded a wrongful death action by one whose relationship to the decedent was illegitimate. In Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872, 35 L.Ed. 2d 56 (1973), the court held that illegitimates were denied equal protection under Texas statutory and common law because, unlike legitimates, they had no right to support from their natural father. In the recent case of Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed. 2d 31 (1977), a section of the Illinois Probate Act was held unconstitutional on equal protection grounds. Under that section illegitimates could inherit by intestate succession only from their mothers. Legitimate children could inherit from either intestate mothers or fathers. Trimble at 430 U.S. 763.

However, a statutory classification may deny equal protection to illegitimate children even if they are not absolutely or broadly barred from a benefit. In Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 92

S. Ct. 1400, 31 L.Ed. 2d 768 (1968), the court held that it was a denial of equal protection to discriminate against unacknowledged illegitimates in providing benefits under a worker's compensation statute. The statute allowed unacknowledged illegitimates to recover benefits only if the statutory maximum recovery had not already been exhausted by benefits to legitimate children or acknowledged illegitimates. Under Louisiana law, an illegitimate child could be acknowledged by a declaration executed before a notary public in the presence of two witnesses, or at the registering of the birth or baptism of the child. Weber at 406 U.S. 167, fn. 3. 2/

In Weber the court struck down the statutory classification of unacknowledged illegitimates even though the bar to benefits was not absolute. This result was in accord with Trimble at 430 U.S. 774, where the court made it clear that the Illinois intestacy statute denied equal protection to illegitimates even though, under the statute, there was no insurmountable barrier to inheritance by illegitimates.

2/ Under Louisiana law an acknowledgment could not be made if the parents were incapable of contracting marriage at the time of conception, but the acknowledgment could be made later if the parents contracted a legal marriage with each other. Weber, 406 U.S. 168, fn. 3. In Weber the deceased worker-father, Mr. Stokes could not easily have acknowledged his illegitimate children because he could not have contracted a legal marriage at the time of the conception of the illegitimates. At that time Stokes was married to another woman who was in a mental institution. Justice Blackmun, concurring in the result, thought that this added burden on Stokes was important and would have based his decision on that factor. However, Justice Blackmun acknowledged that the court was holding the Louisiana statute unconstitutional wholly apart from the inability of Stokes to acknowledge the illegitimates. 406 U.S. at 176, 177. The barrier to acknowledgment in Weber was not greater than in the case of a posthumous illegitimate under Wisconsin law because a putative father would have little reason to acknowledge an unborn child and paternity proceedings would not normally be initiated prior to birth.

These U.S. Supreme Court cases demonstrate that while illegitimacy is not a suspect classification like race, classifications that discriminate because of illegitimacy will receive more far-reaching equal protection scrutiny than laws regulating social and economic matters. Levy at 391 U.S. 71, 72. Trimble at 430 U.S. 767.

". . .The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. . . .Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . .The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" Weber at 406 U.S. 172, 173.

The test of "rational relationship to a legitimate state purpose" is the basic equal protection analysis. The further balancing test of ". . .What legitimate state interest [a]. . .classification promote[s]", versus ". . .What fundamental personal rights might the classification endanger?" involves further scrutiny. In statutory classifications involving illegitimates, this additional scrutiny is not a suspect classification analysis such as with race, but a middle level scrutiny requiring more than a rational relationship test.

In applying this middle level scrutiny and determining what state interest the classification promotes, the state's interest in encouraging stable family relationships may be considered. But, illegitimate relationships may not be discouraged by punishing the offspring of such relationships.

"The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual--as well as an unjust--way of deterring the parent. Courts

are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clauses does enable us to strike down discriminatory laws relating to status of birth where--as in this case--the classification is justified by no legitimate state interest, compelling or otherwise." Weber at 406 U.S. 175, 176.[3/]

". . .we have expressly considered and rejected the argument that a state may attempts to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." Trimble at 430 U.S. 769.

However, the court has recognized that problems of proof in paternity actions do constitute a legitimate state interest,

The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." Trimble at 430 U.S. 770.

Such problems of proof are not an adeqaute rationale for all types of classifications or extra requirements concerning illegitimates,

"We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." Gomez at 409 U.S. 538.

The purpose of sec. 852.05(1), Stats. as it applies to both heirship and wrongful death actions (sec. 895.04, Stats.) is to prevent fraudulent claims of paternity by alleged illegitimate children of deceased fathers. The statute attempts to limit such claims by requiring that an illegitimate prove heirship by an adjudication in a paternity action, an admission by the father in open court, or a written acknowledgment by the father. These requirements meet the first test: they are reasonably related to the purpose

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3/ The Judiciary Committee's comment to Wis. Stats. Ann., sec. 852.05(1977) is in agreement.

"Moreover, most illegitimate children become adopted, and their status becomes that of children of the adoptive parents. Nevertheless, it is important to modernize our statutes on inheritance by, from and through illegitimate persons. Although illegitimacy is still against public policy, a change in the inheritance laws does not promote illegitimacy but merely protects the innocent child."

of preventing fraudulent claims. But, the statutory requirements do not attempt to balance the state's interest in preventing fraud against the posthumous illegitimate's "fundamental personal rights" of inheriting from his father and recovering for his father's wrongful death. The statute does not balance state against personal interest, but rather creates "an impenetrable barrier that works to shield otherwise invidious discrimination." Gomez at 409 U.S. 538.

An illegitimate child born prior to his father's death might have some chance to prove paternity and the collateral rights in dispute here. If the father were alive after the child was born it would be a good deal more likely that a paternity proceeding would be initiated or that the father would have acknowledged the child in open court or in writing. While a paternity proceeding could be brought prior to the birth such an occurence is extremely unlikely. It is equally unlikely that a putative father would acknowledge a fetus either in writing or in open court. Counsel for Herman Caldwell offered to prove that Delores Caldwell only had sexual relations with Herman Blumreich during the period of conception and that Blumreich had verbally acknowledged his responsibility for Delores Caldwell's pregnancy on several occasions. In the case of a posthumous illegitimate the further heavy burden of sec. 852.06 (1), Stats. denies equal protection and bars any chance that the illegitimate might have of establishing his rights.

Due Process.

Sec. 852.05(1), Stats. denies Herman Caldwell due process by creating an irrebuttable presumption that bars unacknowledged or non-adjudicated posthumous illegitimates from proving that they are heirs or entitled to wrongful death benefits.

The due process irrebuttable presumption analysis has been developed by the United States Supreme Court in a number of cases.[4/] In Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed. 2d 551 (1972), an Illinois statute allowed for a child to be declared a ward of the state if it had no surviving parents. Parent was statutorily defined to include parents of legitimate children and the mother of illegitimate children. A child could not be declared a ward unless the parent was determined to be unfit. Mr. Stanley, the father of several illegitimates, whose mother had died, claimed that the statute unconstitutionally discriminated against him because it allowed for his children to become wards of the state with no adjudication of his unfitness.

The court based its ultimate holding on the equal protection clause, but also stated that the Illinois statute violated the fourteenth amendment due process clause. The court reasoned that while some fathers of illegitimate children might make unfit fathers, such fathers have parental rights, cognizable under the due process clause. Such fathers are denied due process by a presumption of their unfitness. Stanley, 405 U.S. at 657-659. The court held that while some illegitimate parents might make unsuitable parents, Mr. Stanley was entitled to a hearing to determine if he was fit. Id. at 405 U.S. 657, 658.

4/ The court has made clear that the irrebuttable presumption analysis may not be applied to all statutory classifications. The right claimed affected by the irrebuttable presumption must have some constitutionally protected status. Weinberger v. Salfi, 422 U.S. 749, 771, 772, 95 S. Ct. 2457, 45 L.Ed. 2d 522 (1975). However, from what has already been stated in the equal protection discussion, it is clear that the ability to establish paternity and inherit from one's father affects, ". . .sensitive and fundamental personal rights." Weber at 406 U.S. 172, 173.

In Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L.Ed. 2d 63 (1973), the court declared unconstitutional a statute concerning classification of non-residents for purposes of tuition at a state university. Married students whose address was outside the state at the time of application, and unmarried students whose address was outside the state any time during the twelve months preceeding application were classified as non-residents and were ineligible for lower tuition. The court analyzed the classification as an irrebuttable presumption and held that the state could not make a statutory classification purporting to be related to residency and then deny those seeking to meet the test of residency the opportunity to present factors concerning that issue. Vlandis at 412 U.S. 451, 452. The court stated,

". . .it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." 412 U.S. 452. (emphasis added).

In Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed. 2d 52 (1974), the court considered administrative regulations that required teachers to take pregnancy leaves four or five months before birth was expected. The court determined that these regulations created an irrebuttable presumption of disability starting in the fifth or sixth month of pregnancy and, that based on medical evidence, this presumption was not clearly or universally true. The court held that absent an individual hearing the rules violated the due process clause of the fourteenth amendment. La Fleur at 414 U.S. 644-648.

These cases demonstrate that where a statutory or regulatory classification is not clearly or necessarily related to the purpose of the rule, a constitutional irrebuttable presumption is created and an individual litigant harmed by the classification has a due process right to a hearing to

show that they do not fit within the purpose of the classification. 5/

This case represents a complete denial of due process for Herman Caldwell and similarly situated posthumous illegitimates. The purpose of sec. 852.05(1) is to avoid fraudulent claims against estates and fraudulent wrongful death claims. The statute has the effect of irrebuttably presuming that all unacknowledged or non-adjudicated posthumous illegitimates, are making fraudulent claims and are not the children of the fathers they claim to be. This presumption ". . .is not necessarily or universally true in fact." Vlandis at 413 U.S. 452. As this case and the case of Robinson v. Kolstad, (No. 77-351, even date), ___Wis. 2d ___, ___N.W. ___(1978), forcefully demonstate, the presumption is often incorrect.

The currently increasing number of illegitimate births poses a problem in estates and wrongful death actions. The percentage of illegitimate births nationally from 1960 to 1976 has almost tripled. In Wisconsin, the percentage of illegitimate births during the same period has more than quadrupled. Absolute numbers of illegitimate births during this period have more than doubled nationally, and almost tripled in Wisconsin. 6/ Among

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5/ This analysis has been criticized by some commentators because while due process is the constitutional term employed, the analysis is similar to that employed in strict scrutiny equal protection. The Irrebuttable Presumption Doctrine In The Supreme Court, 87 Harv. L. Rev. 1534, (1974). Irrebuttable Presumptions; An Illusory Analysis, 27 Stan. L. Rev. 449 (1974) Gunther, Individual Rights In Constitutional Law, p. 486 (1975). Despite these criticisms, Stanley, Vlandis and La Fleur still represent part of the governing minimal requirements of procedural due process.

6/

	WISCONSIN		UNITED STATES	
YEAR.	ILLEGITIMATE BIRTHS.	% OF TOTAL.	ILLEGITIMATE BIRTHS.	% OF TOTAL.
1976	7,143	11%	468,100	14.8%
1970	6,631	8.6%	398,780	10.7%
1965	3,906	4.7%	291,200	7.7%
1960	2,585	2.6%	224,300	5.3%

Source: Wisconsin Statistics are from the Public Health Statistical Reports, Tables 14 and 23. U.S. statistics for 1960-1970 are from Vital statistics of U.S., Vol. 1 Natality, Table 1-29, p. 129 (1973). The 1976 figures are from the Monthly U.S. Vital Statistics Reports, Vol. 26, No. 12, p. 4 (March 29, 1978).

the increasing number of illegitimate children there are bound to be those who, like Herman Caldwell, are born after the death of their father. Despite this phenomonen, sec. 852.05(1), has the effect of denying posthumous illegitimates any means of establishing their paternity, unless a paternity proceeding is carried out or a written acknowledgment is made before the child is even born. These requirements effectively shut posthumous illegitimates out of the legal system and deny them the right to establish their paternity and attendant inheritance and wrongful death rights. Posthumous illegitimates, at least, must be given a chance to prove their paternity. The failure of the statute to provide that right is a denial of due process.

The majority claims that if sec. 852.05(1) were not in effect and if verbal evidence of paternity were admissible intolerable confusion would result.

"Potential heirs and claimants could not be identified with confidence until after the period of limitations had elapsed. The lurking possibility that an unknown putative child would come forward at some future time would frustrate the orderly settlement of estates and resultion of wrongful death claims."

This same lurking possibility of an unknown putative child is present under sec. 852.05(1). The father may have acknowledged an illegitimate child in writing, unknown to the other heirs or parties liable for the father's wrongful death.[7/] With or without sec. 852.05(1), potential heirs and claimants can not be identified with confidence until after the period of limitations has elapsed.

Because sec. 852.05(1) is unconstitutional, I would also hold that Caldwell could bring a declaratory judgment to prove his paternity. Sec. 806.04, Stats. (1975), the Declaratory Judgment statute provides in pertinent part that,

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7/ In Estate of Ecker, 174 Wis. 432, 182 N.W. 2d 977 (1921), this court found that the requirement of a written acknowledgement of illegitimate paternity was met based on a contract and notes to a saloonkeeper. The contract for purchase of a thresher referred to "Joseph Ecker and son." One of the notes to the saloonkeeper was written in German and stated, "Give my son Adolph a keg of beer on my name. Joseph Ecker." Ecker at 174 Wis. 435.

"(1) Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . .

"(12) Construction. This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered."

In Slawek v. Stroh, 62 Wis. 2d 295, 306, 307, 215 N.W. 2d 9 (1974), this court held that a declaratory action is an appropriate mechanism for a putative father to establish his natural parentage of an illegitimate child and to assert parental rights arising from that status.

In Miller v. Currie, 208 Wis. 199, 242 N.W. 570 (1932), this court held that the adult child of a common law marriage could have her alleged status, as the only legitimate child of her father, determined by a declaratory judgment.

I would also hold that a declaratory judgment is an appropriate means for an illegitimate child to establish rights of parentage. By the plain language of sec. 806.04 (1), the petitioner could have had any questions of his status and rights as a minor child of the decedent, not controlled by § 852.05(1) adjudicated in a declaratory action. The trial judge in the declaratory judgment action in this case found that the criteria of sec. 852.05(1) foreclosed heirship and wrongful death rights, absent compliance with the statutory requirements. If sec. 852.05 (1) were constitutionally inoperative as applied to posthumous illegitimates there is no reason why that group could not use the declaratory action to establish their rights.

For these reasons I would reverse that part of the probate order that denied Herman Caldwell the right to a determination of whether or not he was an heir-at-law of the decedent, Herman Blumreich. Having determined in the probate court appeal that sec. 852.05(1) violated equal protection and due process, I would also reverse the order dismissing the declaratory judgment complaint.

I am authorized to state that Justice Shirley S. Abrahamson concurs in this dissent.